2008

Robert Keith Levin v. Hope M. Carlton : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT KEITH LEVIN, Petitioner/Appellee, v. HOPE M. CARLTON, Respondent/Appellant.	:	**Case No. 20080192** **Trial Court No. 054700107**

REPLY BRIEF OF APPELLANT HOPE M. CARLTON

**APPEAL FROM SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH
HONORABLE LYLE R. ANDERSON PRESIDING**

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I. THE TRIAL COURT'S DETERMINATION THAT THE PARTIES' PRENUPTIAL AGREEMENT IS "VALID AND ENFORCEABLE" DOES NOT ABSOLVE IT OF ITS STATUTORY AND EQUITABLE DUTIES.

Wife's first argument on appeal is that the trial court erred as a matter of law in consistently construing and applying the parties' Prenuptial Agreement against her and in favor of Husband without regard to whether the ultimate result was an equitable property division as required by Utah statutory and case law. Husband's response is that Wife failed to show there was any "fraud, coercion or material nondisclosure" in connection with the negotiation and execution of the Agreement, and therefore the trial court properly determined it to be "valid and enforceable." *See* Appellee's Brief at 7-8.

Wife has never argued, and does not now argue, that the Prenuptial Agreement is void *ab initio*. Wife does argue that in construing and applying a valid premarital agreement to the specific facts as they have developed over the course of a long-term marriage and as they exist at the time of enforcement, trial courts have a duty to ensure that their property division, alimony and attorneys' fees awards are fair and equitable to *both* parties. The trial court here failed to fulfill this duty. Instead, it adopted virtually *all* of Husband's arguments about the construction and application of the agreement, and on issue after issue embraced Husband's position. The result is that Wife takes *nothing* by way of property division from a 16-year marriage during which *both* parties worked to build a vast increase in wealth, and winds up under a mountain of debt without alimony sufficient even to meet what the trial court itself determined to be her reasonable needs.

This Court and the Utah Supreme Court have made it clear that the existence of a marital agreement valid at the time of execution does not wholly absolve a trial court of its overarching duty to make an equitable property division. In *Pearson v. Pearson*, 561 P.2d 1080 (Utah 1977), for example, citing Utah Code Ann. § 30-3-5, the Utah Supreme Court stated that "the parties cannot by contract completely defeat the authority expressly conferred by said statute. It is the court's prerogative to make whatever disposition of property, *including the rights in such a contract*, as it deems fair, equitable, and necessary for the protection and welfare of the parties." *Id.* at 1081-82 (emphasis added). The Court emphasized that while the parties' agreement "should be respected and given great weight, the court is not duty bound to carry over the terms thereof." *Id.* at 1082. More recently, in *Reese v. Reese*, 1999 UT 75, 984 P.2d 987, cited by Husband, the Utah Supreme Court noted the "general principle" in support of the enforcement of prenuptial agreements absent fraud, coercion or material nondisclosure at the time of execution, but reiterated that the parties' freedom of contract is not unlimited, and cannot "unreasonably constrain" the trial court's "statutory and equitable duties." *Id.* at ¶ 25.

Husband focuses solely on the terms of the Prenuptial Agreement (and, as set forth below, so did the trial court, in a way that unjustifiably diminishes Wife's reasonable expectations and unduly restricts her rights thereunder) without regard to whether the result is equitable. That focus is simply inconsistent with and seeks to avoid the duty imposed by the above precedents. Other courts that have squarely addressed the tension inherent in applying contract principles in the specific context of a long-term marriage

have rejected the extreme position, advocated by Husband and reflected in the trial court's ruling, that a rigid and formalistic application of the strict rules of commercial contract construction wholly trumps the trial court's duty to make a fair and equitable property division. Instead, they recognize that, due to the unique nature of marital agreements and divorce proceedings, those rules must be applied with some consideration for the substantive fairness of the result reached, particularly when the agreement at issue was negotiated and executed many years prior and intervening events would render its strict enforcement manifestly unjust and inequitable.

For example, in *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989), the Minnesota Supreme Court discussed the circumstances under which it is appropriate to scrutinize a prenuptial agreement for substantive fairness at the time of enforcement:

> Even though the public policy of the state, as reflected by the common law, has long favored antenuptial agreements, nonetheless, this court has always scrutinized challenged premarital agreements purporting to allot property or limit maintenance for procedural and substantive fairness at the inception. This scrutiny has been prompted by a recognition of the existence of potentiality for overreaching by one party over the other due to the relationship existing between them at the time of the execution. We ascertain no reason why courts should not extend a similar scrutiny to challenged provisions of antenuptial agreements, if the premises upon which they were originally based have so drastically changed that enforcement would not comport with the reasonable expectations of the parties at the inception to such an extent that to validate them at the time of enforcement would be unconscionable.

Id. at 267.[1]

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[1] *See also Compton v. Compton*, 902 P.2d 805, 809-10 and n.4 (Alaska 1995) (unforeseen changes in circumstances from the time the prenuptial agreement was

The premises of the Minnesota court's reasoning are fully reflected in Utah law. In *Pierce v. Pierce*, 2007 UT 7, 994 P.2d 193, for example, the Utah Supreme Court reiterated that "important differences exist between marital agreements and commercial contracts." 2007 UT 7 at ¶ 20. The Court expressly noted:

> Parties to premarital agreements *do not deal with one another at arm's length*. Unlike a party negotiating at arm's length, who generally will view any proposal with a degree of skepticism, a party to a premarital agreement is much less likely to critically examine representations made by the other party. *The mutual trust between the parties raises an expectation that each party will act in the other's best interest.*

Id. (*quoting In re Estate of Beesley*, 883 P.2d 1343, 1351 (Utah 1994)) (emphasis added). These differences were certainly present at the outset of this long-term

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entered can render a strict construction and application unfair and unreasonable at the time of enforcement); *McHugh v. McHugh*, 181 Conn. 482, 485-86, 436 A.2d 8, 11 (1980) (requiring the trial court to examine whether "the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice.") (*citing* Clark, Law of Domestic Relations (1968) § 1.9; 2 Lindey, Separation Agreements and Ante-Nuptial Contracts (Rev. Ed. 1970) § 90; 1 Nelson, Divorce and Annulment (1945) § 13.03; 41 C.J.S. Husband and Wife § 80; 41 Am. Jur. 2d, Husband and Wife, §§ 283-305; annot., 57 A.L.R.2d 942)); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981, 988 (Ind. App. 1980) (holding that prenuptial contracts are given liberal rather than strict construction in order to effectuate the intent of the parties); *In re Marriage of Pillard*, 448 N.W.2d 714, 715, 717 (Iowa App. 1989) ("[T]he end result in any dissolution action is not an interpretation of a prenuptial agreement but an assessment of all factors, including the agreement, to see if there is in fact an equitable result.") (Sackett, J., concurring); *Blue v. Blue*, 60 S.W.3d 585, 590 (Ky. App. 2001) ("a broader and more appropriate test of the substantive fairness of a prenuptial agreement requires a finding that the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work an injustice."); *MacFarlane v. Rich*, 132 N.H. 608, 614, 567 A.2d 585, 589 (1989) (holding substantive review for unconscionability at time of enforcement is appropriate).

marriage between a never-married 25-year-old at the beginning of her career and 42-year-old twice-married established businessman.

These "important differences" require trial courts to exercise at least minimal substantive fairness review at the time of enforcement of a marital agreement in light of the parties' reasonable expectations at the beginning of their marriage and subsequent developments during a long-term marriage, including the building of vast wealth through mutual endeavor. Marriage is not, and should not be conducted as, a dispassionate business enterprise. It involves all the vagaries of life, including choices as to lifestyle, childbearing and childrearing, investment, sacrifice and reward, mutual commitment and individual growth. In the dissolution of a marriage, all of these considerations should inform a trial court's interpretation and application of the words and concepts by which the parties set forth their general intent many years prior at the outset of their marriage.

This is not to suggest that trial courts are free to undertake an entirely subjective, free-ranging, open-ended inquiry to an extent that would allow them to rewrite prenuptial agreements and substitute their own judgment for the agreement of the parties. The competing interests of freedom of contract and protection of reasonable expectations also exist in the marital context. Thus, for example, *Pearson* and the other cases cited above recognize a presumption in favor of honoring the parties' intent, and impose on the party challenging a marital agreement the burden of demonstrating that the effect of strictly enforcing it would be so unfair and unreasonable as to reflect a manifest injustice.

But since marital agreements, unlike arms-length commercial contracts, arise in a context of "mutual trust" and with the expectation that "each party will act in the other's best interest," it simply cannot be said that the parties' reasonable expectations would be defeated by the trial court's exercising a degree of scrutiny of the substantive fairness of the result reached rather than rigidly applying the terms of a marital agreement and professing an inability to do anything about the result, even if it is patently unfair and inequitable. As the Minnesota court stated, trial courts must try to "strike a balance between the law's policy favoring freedom of contract between informed consenting adults, and substantive fairness – admittedly a difficult task." *McKee-Johnson*, 444 N.W.2d at 267-68. In this case, the trial court eschewed that task entirely.

Husband admits the trial court failed to engage in any consideration of substantive fairness at the time of enforcement, but calls that simply a "failure to exercise discretion" and not an abuse of discretion. (Appellee's Brief at 8-9) For the reasons discussed above, the trial court's failure to exercise its statutory and equitable duties was not a mere "failure to exercise discretion," but legal error arising from its disregard of relevant precedents. But even under an abuse of discretion standard, while trial courts have "considerable latitude of discretion in the disposition of property," the appellate courts must ensure that a property division does not work "such a manifest injustice or inequity as to indicate a clear abuse of discretion." *Pearson,* 561 P.2d at 1082. Thus, regardless of whether this Court examines the trial court's actions for correctness or an abuse of discretion, the threshold question remains the same: is the substantive result achieved

through the trial court's interpretation and application of the Prenuptial Agreement to the facts in this case consistent with the overarching duty of trial courts in divorce cases to reach resolution that is fair and equitable to both parties?

As set forth in the cases discussed above, answering that question requires an understanding of *both* parties' reasonable expectations. In this case, the trial court focused solely on Husband's expectations, finding it "hard to believe," for example, that Husband could have expected that the term "earnings" as used in the Prenuptial Agreement would include anything other than "salary, guaranteed payments to a member in a limited liability company, or draws to a partner in an operating business partnership."[2] As set forth more fully below, that strict interpretation is not driven by either the plain language or the overall structure and intent of the Agreement. And it is wholly unjustified in light of Wife's reasonable expectations at the time of the marriage and subsequent developments.

As the trial court noted, at the time Wife signed the Prenuptial Agreement, Husband was earning $2 million a year, the parties were living a life of luxury in Southern California, and Wife was pursuing a modeling and acting career. By entering the Prenuptial Agreement, she agreed generally to waive her rights to marital property,

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[2] *See* R. 2296-97, ¶ 42: "The Court finds it hard to believe that [Husband] went to the trouble of obtaining such a comprehensive and detailed prenuptial agreement so that he could ensure that [Wife] could claim one-half of the profits from any business venture in which he would become involved." The trial court purported to ground its speculation in this regard in the language and structure of the Agreement, but neither the language nor the structure dictates what the trial court concluded to be Husband's intention, and one is left with the suspicion that the trial court's "reasoning" was tendentious.

but she also carved out two specific areas where Husband's "earnings" would constitute marital property. Although the Agreement did not require Husband to pursue any vocation, it certainly anticipated that, to the extent he did, there would be *something* to divide, even if the marriage were to dissolve after only a short duration.

Thereafter, Wife uprooted herself and moved from Southern California to Deer Valley to accommodate Husband's desire for a lifestyle change. She abandoned her career and helped Husband create and pursue a luxurious lifestyle of horses, houseboating, entertaining, travel, skiing and resort living. She then uprooted herself again, with a substantial diminution in lifestyle, to help turn a run-down cattle ranch into the world-class Sorrell River Ranch resort. She then devoted herself to caring for and rearing the parties' daughter so that Husband could work more than 100 hours a week on Ranch and other business. She worked long hours herself without pay or benefits, acting as proprietor and hostess to welcome guests and make them feel at home for their stay at the resort. Husband also regularly touted her as a "co-owner" and used her image in promotional materials. Wife joyfully did all of these things with the expectation and understanding that she was helping to build a secure financial future for Husband and herself.

Is it not equally "hard to believe" that, after all this, Wife would reasonably expect the Agreement would be interpreted and applied to endorse Husband's management of his post-marital affairs in such a way as to ensure that he would not have any "earnings," and thereby deprive her of any marital interest, when the matter is totally within his

control? The trial court's negative answer questions means that Wife must reasonably have expected that after she gave her all to the marriage, and as a result contributed to a vast increase in wealth, she could not reasonable expect to have *any* share as marital property. Neither the language nor the structure of the Agreement supports such a draconian conclusion. Instead, as set forth more fully below in Section II of this Argument, an entirely proper, and eminently more fair and reasonable, interpretation of the Prenuptial Agreement would have resulted in a marital interest in at least some part of the more than $20 million in wealth Wife helped create during the marriage.

Not only was the trial court utterly unconcerned with overarching equitable considerations and how any final resolution of this matter might reflect Wife's reasonable expectations under the Prenuptial Agreement, it appears from an overall assessment of the trial court's approach that *at every turn*, when confronted with a decision about how to interpret and apply the Prenuptial Agreement to the specific facts in this case, the trial court adopted Husband's position and rejected Wife's position. In at least one instance, the trial court did so because "it would not have been fair" to Husband. (R. 2517-18) Thus the trial court was not *wholly unconcerned* with "fairness"; it was *selectively concerned* with ensuring a result that was fair – to Husband. That approach is inconsistent with the trial court's legal obligation to ensure the result it reaches is substantively fair and equitable to *both* parties. It also reflects such bias and misprision that this Court can only be left with the definite impression of an abuse of discretion.

II. THE FACT THAT HUSBAND DID NOT "TAKE" OR "RECEIVE" ANY SALARY FROM SORRELL RIVER RANCH OR FLAT IRON MESA DOES NOT MEAN THERE WERE NO MARITAL PROPERTY "EARNINGS" FROM THOSE ACTIVITIES UNDER THE PRENUPTIAL AGREEMENT.

In her opening brief, Wife showed that the first major area where the trial court's overly rigid and formalistic approach created error was with respect to the term "earnings" in the Prenuptial Agreement Wife showed that the Agreement expressly created two different scenarios where post-marital "earnings" become marital property: (1) "earnings," defined as "compensation from labor or services performed by" Husband, "derived from" or traceable to "actual employment or effort" (Tr. Ex. 6, at p. 6, ¶ F.2); and (2) "earnings or salary" from a "business venture" entered into "from and after the date of marriage . . . regardless of whether such earnings or salary have been derived from actual effort or services performed by [Husband] for or on behalf of the business venture." (*Id.* at p. 10, ¶ F.3)

Husband does not address Wife's argument directly, but instead creates a straw man, arguing that Wife's proposed construction and application of the term "earnings" under these provisions would encompass "*any* increase in [Husband's] separate property." (Appellee's Brief, at 14) That is simply untrue; Husband enjoyed a vast increase in his net worth, from $10 million at the time of the marriage to at least $33 million at the time of trial; Wife never suggested she was entitled to half of that increase. Moreover, Wife's interpretation is rooted both in the language of the agreement (the use of the term "earnings *or* salary" indicates they are not the same thing) and in the fact that,

in the specific context of divorce, California courts have refused to equate of "earnings" with "salary," and have expressly ruled that the term "earnings" is "broader in scope than 'wages' and 'salary.'" *In re Marriage of Imperato*, 45 Cal. App. 3d 432, 437, 199 Cal. Rptr. 590, 593 (Cal. App. 1975).

Husband also insists, and the trial court agreed, that "[t]he only tenable reading" of these provisions is "that all earnings or salary *taken* by [Husband] are to be treated as earnings even if his labor and efforts did not directly result in the earnings that were *taken*." (Appellee's Brief, at 16 (emphasis added); *see also* R. 2297, finding that because Husband "did not *receive* any salary or earnings from the Resort or Flat Iron Mesa as contemplated by the Agreement," no marital property interest exists under either provision (emphasis added)) The definition of "earnings" in the Agreement does not require that post-marital "earnings" be paid out, taken or received to become marital property; it simply requires that they be "derived from" or traceable to Husband's efforts or business ventures. But even such a narrow reading, there is no dispute that Husband actually did "take" and "receive" income from Flat Iron Mesa during the marriage, reporting $1,056,080 before 2005, and a total of $1.5 million by the time of trial. (Tr. Ex. 8, at 9, 12)

Wife respectfully submits that only the most crimped and one-sided construction and application of the Prenuptial Agreement to what *did* happen in this case – a reading virtually calculated to deprive Wife of the benefit of her bargain set forth in the very limited exceptions creating marital property under the Agreement – would result in the

conclusion that Husband "earned" nothing from either Sorrell River Ranch or Flat Iron Mesa that could be considered marital property under the Agreement.[3] Such a reading is particularly improper in a case such as this where Husband managed the finances of those endeavors, had complete discretion and control of whether or not he "took" or "received" any "salary," and thus was able to intentionally avoid creating "marital property" by paying directly many personal living expenses through the business and essentially deferring income by not taking out until after the parties had separated and the divorce was final all the profits that were his for the taking all along.

The language and intent of the Agreement, construed with an eye toward justice and equity and without prejudice in favor of Husband or against Wife, plainly supports a broader interpretation than Husband advocated and the trial court embraced. Indeed, the trial court itself recognized as much, stating it "expects that an appeal of this decision is likely" and proceeding to analyze "earnings" under a broader definition. (*See* R. 2244) In doing so, however, the trial court continued to err, ruling that (a) any possibility of "earnings" terminated at the time of separation, even though the Prenuptial Agreement

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[3] Even the case cited by Husband, *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal. 4th 217, 165 P.3d 133 (Cal. 2007), which involves interpretation of the terms "earnings" in the contexts of California's workers' compensation statutes and is therefore irrelevant here, does not support a construction that would require any "earnings" to actually be "taken" or "received." On the contrary, it includes within "earnings" any amount "the employer has offered or promised to pay, or has paid pursuant to such an offer or promise, as compensation for that employee's labor," and that amount can include "profit," "i.e., a specified and promised share of the revenues attributable to that employee's personal sales or managerial efforts." *Id.* at 138, 143. That is essentially the same approach Wife urged on the trial court, and Husband now mischaracterizes as "extremely broad."

defines "earnings" more broadely (*see* Argument Section III below and Appellant's Brief at Argument Section II.A.); and (b) Flat Iron Mesa was not a "business venture," even though Husband chose to incorporate it as such, handled the books and records through the Ranch and his own long-time accounting firm, and otherwise fully satisfied any reasonable definition of that term (*see* Appellant's Brief at Argument Section II.B.).

In order immediately to remedy the trial court's obvious errors with respect to its unjustifiably narrow definition of "earnings," Wife respectfully requests that she be awarded, at a minimum, a one-half share of the $1,056,080 in income Husband received pre-separation from Flat Iron Mesa and reported as income from what he described as his occupation ("Real Estate Developer") on his tax returns. Wife also requests that this case be remanded to the trial court for proper consideration of whether additional "earnings" should essentially be imputed to Husband and considered as part of an equitable property division, including but not limited to the additional $500,000 or so Husband received from Flat Iron Mesa after the parties' separation; the $1.6 million in net cash flow from the Ranch during the marriage; and additional profits taken by Husband upon the sale of the Ranch. The fact that he chose not to "take" or "receive" these funds as "salary" in an apparent effort to deprive Wife of her reasonable expectations and the benefit of the bargain she made in the Prenuptial Agreement does not justify excluding them from the marital estate.

III. HUSBAND'S POST-TRIAL EARNINGS ARE NOT ONLY RELEVANT BUT *MUST* BE CONSIDERED IN THIS CASE, AND THE TRIAL COURT ERRED AS A MATTER OF LAW IN CUTTING OFF DISCOVERY AND EVIDENCE OF "EARNINGS" AS OF THE DATE OF SEPARATION.

Wife's third argument challenges the trial court's ruling that Husband's post-separation earnings are irrelevant. Husband incorrectly asserts Wife failed to identify the ruling appealed from, failed to describe why it was error, and failed to show it was an abuse of the trial court's discretion in governing discovery and other pretrial processes. (*See* Appellee's Brief, at 16-20)

To reiterate, the ruling Wife challenges is the trial court's ruling upholding Husband's unilateral decision to cut off discovery as of December 31, 2005. The trial court did so in denying Wife's Motion to Compel as well as in denying her subsequent Rule 54(b) Motion. (R. 1308-44, 1635-36) Those rulings are erroneous for two reasons: (1) they were based entirely on Section 771 of the California Family Code, which does not apply given the express language of the Prenuptial Agreement to the contrary; and (2) they are contrary to Utah law *requiring* that Husband's post-separation earnings be considered in the unique circumstances of this case in determining property division and/or alimony.

As to the first reason, there is no dispute that Section 771 generally provides that "earnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse." Cal. Fam. Code § 771(a). But the parties' Prenuptial Agreement expressly provides otherwise: "'earnings' or 'base salary,'

or accumulations from such earnings or salary, derived from actual effort or employment of [Husband], *from and after the date of the marriage*, shall be community property." (Tr. Ex. 6 at p. 9, ¶ F.2) (emphasis added). This language plainly encompasses "earnings" derived at any point "from and after the date of the marriage," even if the parties were married but *not* living together, *i.e.*, if they were separated before the divorce was final. The parties' express agreement that the marital estate includes all earnings "from and after the date of the marriage" is controlling, and the trial court erred in cutting off discovery and proof of post-separation earnings based on Section 771.

Even if the Agreement did not expressly supplant Section 771, however, Wife would still be entitled to inquire into Husband's post-separation earnings under applicable Utah statutes. Husband's contrary arguments miss the mark. First, Husband argues that Wife did not preserve this issue below (*see* Appellee's Brief, at 20), but that is simply incorrect – Wife set forth this very argument in her Rule 54(b) Motion. (R. 1587-97) Second, Husband argues that any inquiry into his post-separation earnings would be irrelevant because he stipulated that he could pay any amount of alimony the trial court might award. (*See* Appellee's Brief, at 20-21) Wife's argument, however, goes not to Husband's ability to pay, but to the statutory *requirement* under Utah law that the trial court *must* consider whether this "marriage of long duration" dissolved "on the threshold of a major change in the income of one spouse due to the collective efforts of both." Utah Code Ann. § 30-3-5(8)(e). The trial court could not properly fulfill its statutory

responsibility in this regard without even allowing Wife to discover, let alone present, evidence of such a change.

Although she was not allowed discovery of the issue, Wife did elicit at trial that Husband was in negotiations to sell the Ranch. (R. 2558 at 475) All of the evidence suggests that, after Husband's investing some $12 million and Wife's investing years of "sweat equity," as of the time of the divorce Husband stood "on the threshold of a major change" in the form of profits from the sale of the Ranch due to the value added to the formerly desolate property from "the collective efforts of both." Information about that was not only relevant, the trial court was *required* to consider it. The trial court's ruling precluding Wife from even gathering evidence to demonstrate and quantify that change, evidence that indisputably falls within the scope of Rule 26, was therefore erroneous as a matter of Utah law as well as contrary to the plain language of the Prenuptial Agreement.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN EXPRESSLY AWARDING WIFE ALIMONY IN AN AMOUNT LESS THAN HER ESTABLISHED NEED.

Wife showed that, in the determination of alimony, both the Prenuptial Agreement and applicable Utah law justify special consideration of the unique factual circumstances here. The trial court showed no concern, let alone the "particular concern" counseled in *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987), as to "whether [Wife] has made any contribution toward the growth of the separate assets for [Husband] and whether the assets were accumulated or enhanced by the joint efforts of the parties." Wife therefore challenges the trial court's conclusion – awarding Wife basically what Husband said she

needed as evidenced by her post-separation lifestyle, which was much less than the "Deer Valley" lifestyle she abandoned to help build the Ranch, and which was even less than the amount the trial court itself determined to be her reasonable need – as inconsistent with law.[4]

The trial court recognized and acknowledged that the marital lifestyle was characterized by a situation few people can dream of: an "amenities lifestyle" with all the accoutrements and services of a world-class luxury resort available for use at any time, and a virtually unlimited budget with the ability "to purchase anything [Wife] desired to purchase." (*See* R. 2231-32) The court also acknowledged that the parties spent $9,000 a month pre-separation just on Wife's personal expenses – which obviously did not include housing expenses, food expenses, horse expenses and many expenses for personal care, recreation, housekeeping and other services that were provided by the Ranch. (*Id.* at 2247) The court even acknowledged that, in addition to the many amenities of the resort, Wife had "access to [Husband's] substantial monetary reserves." (*Id.* at 2249)

Rather than even attempt to quantify that lifestyle, however – which is exactly what Wife's expert did – the trial court inexplicably concluded that it could not possibly replace those lifestyle attributes with alimony, and instead set about arbitrarily to slash

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[4] Husband argues throughout his brief that Wife has failed to "marshal the evidence." Husband correctly notes, however, that Wife generally does not challenge the trial court's factual findings, but its legal errors. Where the focus of the challenge is on legal error, the marshaling requirement does not apply. See *Anderson v. Thompson*, Not Reported in P.3d, 2008 WL 2058253 (Utah App. 2008).

the budget Wife's expert proposed to the extent it exceeded Wife's actual, post-separation expenditures. (*Id.* at 2249-50) As a result, the trial court once again reached essentially the conclusion Husband advocated, awarding Wife $12,000 a month net ($15,000 a month gross) where Husband had proposed $10,000 a month and Wife had sought $30,000 a month. (*Id.* at 2251)

The trial court then compounded its error. After establishing that Wife required $12,000 per month in net alimony to satisfy her needs, it determined that she should pay $30,000 of her own fees, plus all fees she incurred after June 30, 2007. (*See* R. 2371, ¶ 77) It did so without any consideration of the fact that requiring her to pay her attorneys' fees would add to her need for alimony, and without making any compensating adjustment to cover that need. As set forth in Wife's opening brief, requiring her to pay attorneys' fees without factoring in the impact on her ability to pay (beyond the $30,000 from her retirement savings) was legal error.

The trial court then further compounded its error in an even more egregious and blatant fashion by requiring Wife to pay *Husband's* attorneys' fees. It did so not only without including the required payments (initially $5,000 a month, later reduced to $2,500 a month)[5] in Wife's needs, but with an express recognition that doing so would

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[5] The trial court's original ruling requiring a deduction of a whopping $5,000 per month, or nearly 50% of the amount the trial court determined necessary to meet Wife's need of $12,000 a month net, was adjusted to $2,500 per month only upon Wife's showing that, assuming she had to pay Robert $5,000 a month and her own counsel $5,000 a month to retire her attorneys' fees obligations, she would be left with $3,000 a month – only one-quarter of what the trial court itself determined to be her need. While requiring Hope to pay at least $2,500 a month for Husband's fees, the trial court speculated, without any

reduce the amount she received *below* what is necessary to meet her post-separation needs – which as Wife has demonstrated was *already* far below the luxurious lifestyle she had enjoyed during the marriage and sacrificed to help build the Ranch.

Specifically, the trial court found that because Husband was the prevailing party under the attorney fees provision of the Prenuptial Agreement, "the court must award [Husband] his fees incurred in connection with the dispute over the application of the [prenuptial] Agreement" (R. 2372, ¶ 82), and that Husband was "entitled to recover these fees from [Wife] by deducting $5,000 [later reduced to $2,500] from each month's alimony payment." (*Id.*, ¶ 84) The court then candidly stated that it "recognizes that allowing [Husband] to deduct $5,000 per month from awarded alimony of $15,000 will mean that [Wife] *will not receive enough money to maintain her at the standard of living she enjoyed during the marriage. [Wife] will naturally have to curtail her living standard but will still be able to maintain a comfortable lifestyle.*" (R. 2372-73, ¶ 85) (emphasis added).

Given the legal requirement that alimony be sufficient to maintain the pre-separation marital lifestyle, the trial court's explicit acknowledgment that it was awarding Wife *less* than that amount, even after all the deductions it had made to Wife's proposed budget, and suggesting she "curtail her living standard" and adjust to a "comfortable lifestyle" instead, reflects an abject failure to apply the factors as required by case law

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evidence, that she would not have to pay so much to her own attorneys, and therefore still declined to consider increasing Wife's need to include her own attorneys' fees. [Cite to ruling]

and statutes. Such a "failure to consider the[] factors constitutes an abuse of discretion." *Batty v. Batty*, 2006 UT App. 506, ¶ 4, 153 P.3d 827.

V. THE TRIAL COURT'S RULINGS ON ATTORNEYS' FEES REFLECT THE SAME RIGID (AND BIASED) MINDSET THAT RESULTED GENERALLY IN AN UNFAIR AND INEQUITABLE CONSTRUCTION AND APPLICATION OF THE PRENUPTIAL AGREEMENT.

Finally, Wife challenged the trial court's rulings on attorneys' fees as a matter of law. As the trial court noted, under consideration were Wife's attorney's fees as well as Husband's. The trial court required Wife to pay her own attorney's fees using her meager retirement account "along with her income, if needed, to cover at a minimum $30,000 of her own fees plus *whatever amount* her fees since June 30, 2007, exceed $30,000." (R. 2371, ¶ 77) The trial court recognized that even requiring Wife to pay $2,500 a month on Husband's fees would reduce her income *below* what it found to be her need, and was wholly unconcerned with the *additional* extent to which requiring her to pay "whatever amount" of her own fees she incurred after June 30, 2007 (the most fee-intense period in the case, involving trial preparation and trial) would even *further* render her unable to meet her needs. Husband does not address the fact that the trial court expressly found its attorneys' fees rulings would violate the standards for awarding alimony, and that is plain legal error by the trial court.

The trial court's requiring Wife to pay her own fees was also improper and unlawful punishment for her having sought to establish her rights to marital property under the Prenuptial Agreement. After acknowledging that Wife would not have enough

to maintain the marital lifestyle, the trial court stated that was simply a consequence of Wife's "decision to pursue a claim for community property when the clear intent of the Agreement she signed before marrying was to sharply limit the creation of community property." (R. 2372-73, ¶ 85) In other words, although on its face the Prenuptial Agreement recognized two specific instances in which Husband's post-marital "earnings" would become marital property, and although Wife advanced legitimate arguments that such "earnings" flowed both from his post-marital efforts with the Ranch and his Flat Iron Mesa business venture, because the trial court did not ultimately accept those arguments it was justified in punishing Wife for even making them.

The trial court's punitive approach is ungrounded in any statute or rule authorizing sanctions, and is contrary to public policy. It would require a party to decide at the outset of a case either to acquiesce in the other party's interpretation of a premarital agreement *or* risk being on the hook for her own fees as well as those of the other party, even if she has advanced reasonable contrary interpretations (as the trial court here found). That risk would have such a chilling effect as to effectively preclude a party from presenting her case, contrary to the public policy set forth in the attorneys' fees statute.

Husband argues that the trial court's advancing Wife $120,000 in fees through June 30, 2007 allowed Wife to present her case, and that the trial court warned Wife that she might be obligated for attorneys' fees from her alimony award or property division. (*See* Appellee's Brief, at 27, 31, 34) Wife understood and accepted this warning to suggest she would be held responsible if she were to drag things out or present frivolous

arguments, and indeed requiring a party to pay her own fees under such circumstances essentially as a sanction might be appropriate in certain cases. But Wife also reasonably understood and expected that if the trial court required her to pay attorneys' fees it would give her the means to do so – otherwise it would not be meeting its legal obligation to ensure that she could maintain the marital lifestyle.

With specific reference to the trial court's applying the Prenuptial Agreement to require Wife to pay Husband's fees, Husband's position, and the trial court's ruling, simply avoids an inevitable conflict in principles where a marital agreement appears to dictate a result that would work a substantial injustice in a particular case contrary to statutory elements and case law precedents. Other courts have addressed that conflict head on, and in so doing have recognized that resort to the "certainty" of over-reliance on the parties' intent expressed many years prior should not trump consideration of the standard statutory criteria and case law precedents for awarding attorneys' fees.[6] The trail court here simply avoided the conflict and punted to this Court.

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[6] *See Kessler v. Kessler*, 33 A.D.3d 42, 45, 47-48, 818 N.Y.S.2d 571 (N.Y. App. Div. 2006) ("The enforceability of a provision of a prenuptial agreement waiving the right to seek an award of an attorney's fee presents a clash of two competing public policies-that in favor of resolving marital issues by agreement and that in favor of assuring that matrimonial matters are determined by parties operating on a level playing field. . . . The determination as to whether or not a provision waiving the right to seek an award of an attorney's fee is enforceable must be made on a case-by-case basis after weighing the competing public policy interests in light of all relevant facts and circumstances both at the time the agreement was entered and at the time it is to be enforced. If, upon such an inquiry, the court determines that enforcement of the provision would preclude the non-monied spouse from carrying on or defending a matrimonial action or proceeding as justice requires, the provision may be held unenforceable.") *See also Mulhern v. Mulhern*, 446 So. 2d 1124, 1125 (Fla. App. 1984) ("[T]he trial court should have

CONCLUSION

Wife wishes to bring to the Court's attention one final development that she believes reflects the trial court's continuing animosity and refusal to consider the substantial inequities in its rulings. Last fall, after Wife completed her individual tax returns, she filed a motion with the trial court seeking a modest adjustment in her gross alimony award to reflect her actual combined effective tax rate rather than the 20% tax rate the trial court assumed. The trial court failed to rule on that motion for several months. Finally, after repeated inquiries from Wife's counsel as to the status of the ruling, the trial court issued a one-sentence order denying Wife's motion without explanation.

Wife has sought to avoid drawing inferences as what might explain the trial court's obvious propensity to consistently adopt Husband's positions and reject hers. Wife has demurred even when the trial court has unfairly castigated Wife in personal terms.[7] This latest ruling, however, leaves Wife with the distinctly disturbing sense that

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adjudicated the issue, without bar of the agreement, considering all the usual pertinent criteria such as the respective financial circumstances of the parties, that is to say, the need of the wife and the ability of the husband to pay. It is basic that the purpose of awarding attorney fees is to place the spouses on a financial parity for the prosecution or defense of the dissolution action.").

[7] The most egregious example is the trial court's accusing Wife of "attacking [Husband's] character in her filings in support of her Motion for Temporary Orders. (*See* R. 2518) The fact of the matter is that Wife's initial motion papers did not include any such attacks, but Husband responded with savage attacks in his own Affidavit and those of his girlfriend and others falsely accusing Wife of all kinds of misdeeds that were totally irrelevant to the financial issues Wife raised. Wife was then forced to defend

the trial court in this case is fundamentally incapable of or unwilling to follow an unbiased, reasoned, fair approach on any issue she raises. Accordingly, Wife respectfully requests that this Court grant her affirmative relief as dictated by the record, and remand this case to the trial court with specific instructions so that she can have confidence that justice and equity will be done.

Specifically, Wife respectfully requests that this Court grant her the following relief:

- An immediate property division award of $528,040, representing one half of Husband's pre-separation earnings from Flat Iron Mesa, pursuant to Paragraph F.3. of the Prenuptial Agreement;
- An additional property division award of $800,000, representing one half of the $1.6 million pre-separation net cash flow from the Sorrell River Ranch;
- Instructions to the trial court to construe the term "earnings" in the Prenuptial Agreement as extending to post-separation gains by Husband from both Flat Iron Mesa and the Sorrell River Ranch and to award Wife an equitable share thereof;
- Immediate relief from the obligation to pay Husband's attorneys' fees so that she receives the $15,000 a month gross alimony the trial court itself determined to represent her need;

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herself. Rather than view that skirmish in the proper light, the trial court blamed it on Wife and cited it as further justification for its punitive attorneys' fees ruling.

- Instructions to the trial court to ascertain the total amount of Wife's attorney's fees incurred from and after June 30, 2007, including for this appeal, and to make an attorney's fees award consistent with the statutory requirements in light of the reasonableness of the fees incurred and the parties' respective ability to pay.

DATED this 1st day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2009, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were sent by United States Mail, postage prepaid, addressed to the following:

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